

December 12, 2019

Nalisha Asgarali
Environmental Policy Branch - Land Use Policy
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submitted via email: Nalisha.Asgarali@ontario.ca

Dear Nalisha Asgarali,

**Re: Comments on amendments to the Pesticide Regulation (63/09 General)
(ERO 019-0601)**

On behalf of the Canadian Environmental Law Association (CELA), please accept the following comments concerning proposed amendments to Regulation 93/09 ([ERO 019-0601](#)). These comments are in addition to those submitted¹ by CELA on November 27, 2019 to the Chair of the Standing Committee on General Government and the Ministry of Economic Development, Job Creation and Trade, in response to related amendments to the *Pesticides Act* contained in Schedule 9 of Bill 132.

Summary:

- The removal of Ontario's pesticide classification system will remove important safeguards for protecting the environment and public health from exposure to pesticides.
- In revising Regulation 63/09 a longstanding weakness and inconsistency in pesticide safety training requirements has been overlooked and will likely continue to contribute to excess exposure to pesticides from their use by Pest Control Operators. Important considerations of equity and social justice arise since this exposure will likely continue to be disproportionately imposed upon low income and vulnerable Ontarians.
- CELA strongly supports the government's stated commitment to retain Ontario's ban on the cosmetic use of pesticides. However, we are concerned the amendments to Regulation 63/09, as proposed, will undermine Ontario's commitment and ability to retain the ban.
- The policy foundation underlying Ontario's ban on the cosmetic use of pesticides is precautionary. As such, it rejects any exposure to pesticides that are used needlessly or for purely cosmetic reasons. This precautionary basis must be maintained.

¹ Lindgren, R. (2019) CELA Submissions to the Ontario Government on Bill 132, <https://cela.ca/submissions-on-bill-132/>

- The proposed new and/or revised criteria for adding to the list of pesticides allowed for cosmetic use do not ensure that Class B/Restricted and high risk pesticides will be exempt from consideration.
- The new criteria also includes far too subjective language to guide the Director's decision and introduces opportunities for bureaucratic delay and poor decision-making that could lead to approval of currently banned pesticides for cosmetic use.
- Proposed revisions to reduce tracking of the use and sale of neonicotinoid-treated corn and soybean seeds are likely to contribute to increased use and as such are regressive and will contribute to the already dire situation of global collapse of insect populations, including key pollinators essential for food production and ecosystem health.

Background about CELA's involvement in pesticide issues

The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization founded in 1970. CELA is an environmental law clinic – within Legal Aid Ontario - dedicated to providing legal services to low income people and disadvantaged communities, and advancing the cause of strong environmental protection through advocacy and public legal education.

Members of our staff have worked on pesticides issues for over 35 years, providing legal representation, conducting scientific and legal research, participating on provincial and federal government advisory committees, and responding to countless requests for information about pesticide law and policy from the public.

We have been at the forefront of Canadian activity summarizing the research about human health impacts of pesticides, particularly to children and vulnerable/marginalized populations, and in efforts to modernize pesticide law and regulation provincially and federally. We have acted in the courts on behalf of clients adversely affected by pesticides as well as on behalf of multiple groups and individuals who successfully opposed repeated legal challenges to pesticide bylaws in Hudson, Quebec and Toronto, Ontario, as well as groups intervening in federal re-evaluations and special reviews regarding neonicotinoid pesticides. We also strongly supported Ontario's efforts to restrict the use of neonicotinoid-treated corn and soybean seeds within the Pollinator Health Strategy.

Drawing upon this background and expertise and in light of detailed comments below, we disagree with the statement in ERO 019-0601 that the “proposed legislation and regulatory changes are not anticipated to have significant environmental impacts.” We also note that the ERO notice mischaracterizes provincial pesticide requirements as duplicative of federal regulation. As noted by the Supreme Court Canada,² there is bi-jurisdictional and complementary responsibility for pesticide regulation in Canada. Provincial requirements complement the federal regulatory regime in every province in Canada, enhancing environmental and health protections.

² 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town) <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1878/index.do>

The Proposed Removal of Ontario's Pesticide Classification System

As noted in our comments about Bill 132, Ontario's existing twelve pesticide classes expand upon the four existing federal classes, and accomplish several important objectives, including:

- influencing training, licensing and related requirements to address occupational, environmental, and public health risks for higher hazard products;
- restricting public purchasing access for domestic products depending on package size and product risk;
- specifying the list of pesticides that are banned for cosmetic use (currently Class 9 – active ingredients and Class 8 – specific pesticide products banned for domestic use) and the list of those that can be used as low-risk options for cosmetic use (currently Class 11); and;
- specifying certain neonicotinoid-treated corn and soybean seeds as targets for use reductions to protect pollinators.

Each of these four areas is discussed in turn below.

a) Training and Licensing Shortcomings in the Regulation Remain Unaddressed

Despite the large overhaul of Regulation 63/09 contemplated in the proposed revisions, an opportunity is missed to strengthen a longstanding weakness and inconsistency in the Regulation with respect to pesticide safety training requirements for non-farming related licensing of pesticide use.

Specifically, Section 5(1) of the *Pesticides Act* requires users of any pesticides (aside from those in the Domestic Class – Class D) to be licensed. Regulation 63/09 also requires farmers and farmers' assistants, *and only farmers and farmers' assistants*, to update pesticide safety training every five years as a condition of renewing their license.³

In contrast, Pest Control Operators (PCOs) licensed to apply the same types of hazardous pesticides used by farmers but in indoor/structural settings (e.g., to treat bed bugs or cockroaches in hotels, schools, child care facilities, long-term care residences, or homes or apartment buildings) are not required to regularly update their original training as a condition of license renewal. Moreover, they can have up to three assistants working for them who require no formalized training at all.

Within discussions at the Ontario Pesticides Advisory Committee and elsewhere, this discrepancy has been raised repeatedly with the Director of Pesticides Policy and other officials within the Ministry of Environment, Conservation and Parks as a key shortcoming that puts public and worker safety at risk.

³ Details are on-line here: <https://www.opep.ca/>

Such risks are confirmed in the Pest Management Regulatory Agency (PMRA) annual Compliance and Enforcement reports⁴ that have found repeatedly high rates of non-compliance among PCOs. Non-compliance activities have included: use of unregistered products; not following the label in terms of targeted pest, use site, and application rate; and not following safety precautions such as proper handling of products, precautionary notifications (e.g., to tenants) and use of personal protective equipment.

This largescale revision to Regulation 63/09 should address this serious shortcoming and ensure consistent pesticide safety training among all commercial pesticide users in order to better protect occupational and public health.

This is an important matter of equity and social justice. It is well established that greater pesticide use occurs under low-income circumstances and/or sub-standard housing conditions. These circumstances can contribute to greater exposure to pesticides and other chemicals, both to present-day products and to legacy chemicals that have been restricted or banned. These vulnerable populations are also more likely to be challenged with poorer nutrition and greater stresses and chronic disease, potentially related to and also magnifying adverse effects of pesticides. Reform of Regulation 63/09 can help to alleviate this problem by addressing this longstanding problem of inadequate (and unfairly standardized) provincial training requirements for those who use hazardous pesticides.

This lack of attention to inconsistent training requirements in the proposed revisions is underscored by the proposal to remove from Regulation 63/09 re-training requirements for vendors of neonicotinoid-treated seeds.

b) Removal of Classes 5, 6, 7, and 10 may increase public exposure to pesticides

Ontario's existing division of Domestic pesticides (federal Class D) into Classes 5, 6 and 7 provide for some measure of controlled access to pesticides by limiting the location of where pesticides can be sold, both by types of pesticide and package size (Classes 5 and 6), and, along with Class 10, by clearly noting the list of products controlled for non-cosmetic use. Removing

⁴ Four annual reports are available online indicating this longstanding pattern of high rates of regulatory non-compliance in the PCO sector:

Canada, Health, and Health Canada. "Pesticides Compliance and Enforcement Report for 2014-2015." March 31, 2016. <https://www.canada.ca/en/health-canada/services/consumer-product-safety/reports-publications/pesticides-pest-management/corporate-plans-reports/pesticides-compliance-enforcement-report-2014-2015.html>.

Canada, Health, and Health Canada. "Pesticide Compliance and Enforcement Report for 2015-2016." December 29, 2016. <https://www.canada.ca/en/health-canada/services/consumer-product-safety/reports-publications/pesticides-pest-management/corporate-plans-reports/pesticide-compliance-enforcement-report-2015-2016.html>.

Canada, Health, and Health Canada. "Pesticide Compliance and Enforcement Report for 2016-2017." February 19, 2018. <https://www.canada.ca/en/health-canada/services/consumer-product-safety/reports-publications/pesticides-pest-management/corporate-plans-reports/pesticide-compliance-enforcement-report-2016-2017.html>.

Canada, Health, and Health Canada. "Pesticides Compliance and Enforcement Report for 2017-2018." February 22, 2019. <https://www.canada.ca/en/health-canada/services/consumer-product-safety/reports-publications/pesticides-pest-management/corporate-plans-reports/pesticide-compliance-enforcement-report-2017-2018.html>

Classes 5 and 6 creates the potential for a much larger range of vendors to apply for licenses to sell a wider range and higher volume of pesticides. Under the current situation, parents are able to keep their children out of the pesticides aisle in hardware stores. Those with chemical sensitivities often need to avoid such stores altogether. Increasing the range of vendors who can sell pesticides will increase public exposure to the off-gassing of pesticides that occurs in most hardware stores. Removing Classes 7 and 10 may result in vendors inappropriately removing controls on pesticide sales for non-cosmetic use.

c) Revisions to the ban on cosmetic use of pesticides

While we support the stated commitment in the consultation documents to retain Ontario's ban on the cosmetic use of pesticides, we are very concerned that proposed amendments to Regulation 63/09 will undermine this intent.

Ontario's ban on the cosmetic use of pesticides has always had very broad public support because it takes a precautionary approach to eliminating needless pesticide exposure. In this context, we note that the most recent report of Ontario's Auditor General⁵ states that between 2014 and 2018, a total of 76 samples out of 1,200 Ontario-grown produce samples tested by the Ontario Ministry of Agriculture, Food and Rural Affairs had pesticide residues that exceeded Health Canada's allowable limits. Such exceedances are in addition to the burden of pesticide residues that is legally allowed in foods.

Any weakening of Ontario's ban on the cosmetic use of pesticides will increase overall pesticide exposure, of particular concern for vulnerable populations including children, pregnant women and prospective parents, with the potential for corresponding risks to preconception and prenatal health and healthy child development. A growing body of scientific evidence has long pointed to known and suspected harms of even low-dose exposures to toxic substances, including pesticides, during these vulnerable life stages.

For Ontario's cosmetic pesticide ban there has long been broad public recognition that in a world of multiple chemical exposures, to pesticides and many other toxic substances, we can and should avoid those pesticide exposures that are unnecessary or for purely cosmetic purposes.

For the proposed amendments to Regulation 63/09, we are concerned about new and discretionary powers given to the Director within MECP. In a revised version of the existing Class 11⁶ (currently referred to as "biopesticides or certain lower risk pesticides"), the proposed changes to Section 17 refer instead to "listed active ingredients, cosmetic purpose."

The revisions to Section 17 modify the existing guidance for adding to the list of pesticides allowed for cosmetic use, bring the criteria for these decisions into the Regulation, and raise the following three concerns.

⁵ Office of the Auditor General of Ontario, Annual Report 2019, Volume 1, Section 3.06.
<http://www.auditor.on.ca/en/content/annualreports/arbyyear/ar2019.html#volume1>

⁶ <https://www.ontario.ca/page/class-11-pesticides>

i) Class B/Restricted Pesticides have no place in a list allowed for cosmetic use

First, proposed Section 17.(1) 1) gives the Director the ability to consider pesticides from Class B, (or Restricted), as “appropriate” for the listed active ingredients, (i.e., allowed for cosmetic use). We note that the federal *Pest Control Products Regulations* define Class B/Restricted as follows (emphasis added):

(c) “RESTRICTED”, if the pest control product is one for which the Minister, out of concern for its health or environmental risks, has set out additional information to be shown on the label concerning essential conditions respecting the display, distribution or limitations on use of, or qualifications of persons who may use, the product;

Given the precautionary foundation of the ban on cosmetic use, it is contradictory for the Director to be able to consider Class B or Restricted pesticides as “appropriate” for the list of pesticides to be allowed for cosmetic use in Ontario. In contrast, existing criteria for adding pesticides to the Class 11 list refer only to including pesticides that the PMRA considers as a “biopesticide” or “low risk,” and follows PMRA guidance (particularly DIR2012-01) on non-conventional and low risk pesticides.⁷

As well, the “Guide to Pesticide Classes” issued as part of this consultation states that the Class 11 list has been developed following this PMRA guidance. It further states that, moving forward “only active ingredients contained in pesticides registered as non-conventional pesticides under DIR2012-01 are eligible for consideration as to whether an active ingredient is an active ingredient that poses a low risk to human health and the environment.”⁸

While this statement is reassuring, it is undermined by the proposed language of Section 17.(1) 1) that enables the Director to consider applications for adding Class B/Restricted pesticides to the “listed active ingredients.” Including this language in the Regulation opens the door to the Director having to consider applications for high risk pesticides and those currently banned for cosmetic use in Ontario.

For a proposal with the oft-stated intention of reducing bureaucratic waste, combined with the stated commitment to maintain the existing cosmetic ban, it should not be possible for the Director’s time to be wasted on considering Class B/Restricted pesticides as “appropriate” for cosmetic use. At a minimum, and for greater clarity, the Proposed Guide to Pesticide Classes should specify, in the section outlining the process for determining whether an active ingredient is appropriate for use for a cosmetic purpose (“Moving Forward” – page 11 of the consultation draft), that active ingredients listed in the current Class 9 will not be considered for addition to the “listed active ingredients, cosmetic purpose.”.

⁷ As described in multiple PMRA directives but particularly: Regulatory Directive DIR2012-01: Guidelines for the Registration of Non-Conventional Pest Control Products. https://www.canada.ca/content/dam/hc-sc/migration/hc-sc/cps-spc/alt_formats/pdf/pubs/pest/pol-guide/dir2012-01/dir2012-01-eng.pdf

⁸ Guide to Pesticide Classes, page 12. Linked to <https://ero.ontario.ca/notice/019-0601#supporting-materials> at: <https://prod-environmental-registry.s3.amazonaws.com/2019-10/Guide%20to%20Pesticide%20Classes.pdf>

We note the above in stark contrast to several other areas of the Regulation where limited or no access to Class B/Restricted pesticides is consistently applied in order to protect worker health and safety or to prevent pesticide impacts on the environment or public health.

ii) *Subjective criteria for determining whether an active ingredient is “appropriate” for cosmetic use*

The Guide to Pesticide Classes goes on to state that the criteria provided in Section 17.(1) to be applied by the Director are consistent with those previously applied in maintaining the Class 11 list. However, while some are the same, key differences have been introduced.

In addition to the above problem of the Director now being able to consider Restricted pesticides for cosmetic use, subjective language is added that is problematic.

In particular, in Section 17. (1) 2. ii) B, new language not previously in MECF guidance states that the Director needs to consider that (emphasis added):

“The products in which the active ingredient is contained are unlikely to be used in a manner that is likely to cause significant exposure to humans”

This language is vague and subjective. Previous guidance stated more simply that the “product is used in ways that do not cause significant exposure” followed by a clear example, i.e., that the product is pre-mixed or applied in a closed system, reducing human or environmental exposure.

There is also a contradiction between this proposed language and the stated intent of this overall proposal, i.e., that the Province is reducing duplication with the efforts of the PMRA. The federal pesticide registration process already conducts an exposure assessment, the result of which is supposed to avoid significant exposure. That being the case, it is inappropriate for the Director, who is debatably qualified and ill-supported by qualified staff, to now subjectively second guess the exposure assessment exercise undertaken by the PMRA in support of a pesticide registration decision. While such an assessment by the Director may have little to no consequence for a biopesticide, (and thus be another bureaucratic waste of time), it would be very important to avoid if applications are made for higher risk pesticides to be added to the list allowed for cosmetic use.

iii) *Pesticides are intended to kill living organisms; they should never be referred to as “safe”*

Of even greater concern is the criterion in Section 17. (1) 2. ii) D, that states:

“The active ingredient is widely available to the public with a history of safe use”

Again, previously applied detail, in determining pesticides allowed for cosmetic use, is removed and the new language is both vague and inappropriate in reference to pesticides. Previous guidance for allowing pesticides for cosmetic use referred to products “that have been widely

available to the public for other uses for some time” (emphasis added) and with no use of the word “safe.”

The key difference in noting the products have been available “for other uses” relates to the existence of pesticide-like properties of otherwise benign products, such as vinegar.

There is a longstanding insistence by the pesticide industry that a regulatory approval from the PMRA for a pesticide is a determination of safety. It is not. The PMRA’s regulatory approval of pesticides is a determination of acceptable risk, not safety.

It is irresponsible and dangerous to refer to products intended to kill living organisms as “safe,” even for the current Class 11 products intended for cosmetic use. Referring to pesticides as “safe” also undermines public awareness efforts about careful use, and reading labels, as well as the fact that it is against federal law to not follow instructions on a pesticide label given that failure to do so could result in undue exposure, and health or environmental harm.

In addition to the above concerns about revisions to Regulation 63/09 undermining the cosmetic use ban, the proposed exemption for cemeteries further undermines the intent of the cosmetic use ban. Cemeteries, like public parks, are important urban green spaces for people, including children, and provide crucial habitat for species diversity. While the current exceptions to the ban allow for lawn maintenance for specialty turf and sports fields, the same exacting considerations do not apply in cemeteries. The proposed exemption will increase urban pesticide use and are not justified.

To reiterate, we appreciate the stated intent to retain the ban on cosmetic pesticide use but submit that proposed revisions to Regulation 63/09 undermine this intent. Hence, in light of the above comments, and assuming this revision to Regulation 63/09 remains substantially intact, we strongly recommend the following revisions:

- **Insertion of language in Section 17. (1) that the intent of the ban on cosmetic use is precautionary in order to avoid needless exposure to pesticides**
- **Removal of the ability of the Director to ever include Class B/Restricted pesticides on the “listed active ingredients”**
- **Insertion of language, in reference to products with wide availability, to clarify this availability is for products “used for other non-pesticide applications”**
- **Removal of any reference of the use of pesticides as “safe”**
- **Removal of the exemption for cemeteries.**

d) Reducing the use of corn and soybean seeds treated with neonicotinoid pesticides

Removal of Class 12 and proposed revisions to Regulation 63/09 will remove important mechanisms to limit the use of neonicotinoid-treated seeds. Gone in these consultation documents is any reference to Ontario’s Pollinator Health Strategy and the aspirational target of an 80% reduction in acreage of corn and soybean fields planted with neonicotinoid-treated seeds and corresponding measures to track sale and use. Instead, under the guise of reducing administrative burden, the proposals will inappropriately reduce measures to evaluate whether

and when use of neonicotinoid-treated seeds is necessary, notably to prevent the unnecessary and prophylactic use of treated seeds, as well as measures to track and assess trends in sales. These changes have the potential to undermine Ontario's ability to progressively reduce the use, including unnecessary use, of neonicotinoid-treated seeds and to address the well-documented and world-wide crisis of crashing insect populations and loss of pollinator species.

We consider these revisions a backward step that will undermine any overall goal of reducing use of these treated seeds as well access for researchers and risk assessors to comprehensive data on historical and current use of neonic-treated seeds to assess impacts on ecosystem health. While the consultation document anticipates no significant environmental impacts from these changes, it is very likely the changes related to neonicotinoid-treated seed will lead to increased use and eliminate important progress made over the last five years. We therefore recommend that the current regulatory requirements for neonicotinoid-treated seeds, including the conduct and timing of pest assessments, independent pest assessments, and annual reporting of seed sales, be unchanged.

All of which is respectfully submitted.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

A handwritten signature in black ink, appearing to read "Kathleen Cooper". The signature is fluid and cursive, with a large loop at the end.

Kathleen Cooper
Senior Researcher and Paralegal